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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/810,461

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Barbara Z. Stawski

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28455 7590 04/07/2008

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EXAMINER

MAHAFFEY, KELLY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

04/07/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/810,461

**Applicant(s)**

STAWSKI ET AL.

**Examiner**

Kelly Mahafkey

**Art Unit**

1794

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 07 January 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-21, 30, 31 and 33-36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21, 30, 31 and 33-36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 4-11, 13-20, 30, 31, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hanke (WO 97/06695). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 2, 3, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hanke (WO 97/06695) in view of Luhadiya (WO 97/03569). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hanke (WO 97/06695) in view of Coia (EP 0431376 A1). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hanke (WO 97/06695) in view of Klacik et al. (US 4452825). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 35 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hanke (WO 97/06695) in view of Linden and Lorient (New Ingredients in Food Processing). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 1-3, 5-8, 13-16, 18-20, 30, 31, 33, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Luhadiya (WO 97/03569) in view of Hanke (WO 97/06695). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luhadiya (WO 97/03569) in view of Hanke (WO 97/06695), further in view of Klacik et al. (US 4452825). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 1, 4-10, 13-15, 18-20, 30, 31, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of Hanke (WO 97/06695). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of Hanke (WO 97/06695), further in view of Luhadiya (WO 97/03569). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of Hanke (WO 97/06695), further in view of Coia (EP 0431376 A1). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of the combination of Hanke (WO 97/06695) and Luhadiya (WO 97/03569), further in view of Coia (EP 0431376 A1). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of Hanke (WO 97/06695), further in view of Klacik et al. (US 4452825). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

Claims 35 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US 4517205) in view of Hanke (WO 97/06695), further in view of Linden and Lorient (New Ingredients in Food Processing). The references and rejection have been incorporated herein and as cited in the office action mailed March 22, 2007.

### ***Response to Arguments***

Applicant's arguments filed January 7, 2008 have been fully considered but they are not persuasive.

Applicant argues that there is no teaching of a "centre-filled candy" with a hard candy center in Hanke. In response to applicant's argument, the examiner recognizes

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that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, applicant's argument is not convincing as one of ordinary skill in the art at the time the invention was made would have been motivated to choose the hard candy embodiment as taught by Hanke for the final product and for the center filled candy to be composed of both a hard candy shell and a hard candy core, because Hanke teaches that the carriers for both candy layers are typically of the same form and of the same general composition as stated in the rejection.

Applicant argues that the center-fill candy teaches of Hanke are directed towards candy products which do not have a hard candy core and outer layer and thus are not applicable. Applicant's argument is not convincing as all the examples do not have to meet specific requirements in order to form a teaching, as Hanke teaches non limiting examples.

Applicant argues that there is no motivation for hard candy outer layer with the level of cooling agents in the outer layer greater than the level of cooling agents in the inner layer. Applicant's argument is not convincing as Hanke teaches the outer candy layer is composed of the coolant composition and the core is composed of the flavor composition. Furthermore, one of ordinary skill in the art at the time the invention was made would have been motivated to select the embodiment, as taught by Hanke, in which the jacket was composed of the coolant composition and the core was composed of the flavoring composition, in order to first experience the physiological effects of the coolant, such as clearing of the nasal passage, etc, so that the flavor composition would be more greatly experienced.

In response to applicant's argument that Hanke and Luhadiya are nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the

claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, both references are directed towards jacketed candies and are within the field of applicant's endeavor.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

#### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/

Primary Examiner

Art Unit 1794

/Kelly Mahafkey/

Examiner

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